

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds that the Award should be modified, and claimant should be awarded benefits for a 20 percent permanent partial disability to the right upper extremity.

### **Findings of Fact**

1. Claimant, who owns but also works as an employee of respondent corporation, injured his elbow lifting a jewelry showcase on November 13, 1994. He did not initially seek medical help but took off work for one week. While he was off the symptoms became better. When he returned to work he became very sore and sought medical care.
2. Dr. Peter S. Lapse first saw claimant January 26, 1995, and eventually diagnosed lateral epicondylitis. After treatment with injections, Dr. Lapse performed surgery on January 17, 1996. Dr. Lapse's notes of January 29, 1996, 12 days after the surgery, state that the patient may return to regular duty with no restrictions. Claimant testified he was off approximately 10 days after the surgery. Although Dr. Lapse did not specifically order that claimant be off work, he testified it would have been reasonable for claimant to be off during the period from the surgery until the follow-up visit which was on January 29, 1996.
3. Claimant paid himself full wages during the time he was off immediately after the injury and again when he was off after the surgery.
4. On July 8, 1996, Dr. Lapse wrote respondent's insurance carrier and provided an impairment rating. He rated the impairment as 10 percent of the upper extremity.
5. Claimant continued to work but also continued to have problems. In June 1997, claimant aggravated the injury to his elbow while hammering silver. Claimant returned to see Dr. Lapse, and Dr. Lapse took claimant off work for one week. On this occasion, claimant did not pay himself. He testified he did not pay himself because the insurance carrier had refused to pay permanent disability benefits if he continued to receive a wage.
6. Claimant's injury was evaluated by Dr. Lynn D. Ketchum at the request of claimant's counsel. Dr. Ketchum diagnosed myositis of the extensor muscle mass of the right forearm. He rated the impairment as 20 percent of the right upper extremity. Dr. Ketchum's report indicated the rating was 50 percent of the right upper extremity, but at his deposition he stated this was a typographical error and corrected the rating to 20 percent.
7. Dr. Lynn A. Curtis conducted an independent medical examination at the request of the Administrative Law Judge. He diagnosed right lateral epicondylitis and status-post Hirsch procedure, pre-chronic pain syndrome. He rated the impairment as 45 percent of the right upper extremity and testified that 25 percent of this rating is for chronic pain.

### Conclusions of Law

1. At the time of claimant's injury, the Act limited a claimant to medical benefits in cases where the injury did not disable the claimant for one week from earning full wages at the work at which he/she was employed. K.S.A. 44-501(c). *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198 (1996).
2. The Board concludes claimant was disabled for one week from earning full wages at the work at which he was employed and is entitled to permanent disability benefits. Even though claimant paid himself, he was disabled for more than one week and did not perform the work at which he was employed at the time of the accident. The circumstances here are not materially distinguishable from other employment where the employer might decide to pay a claimant who could not work either by paying sick leave, vacation pay, or simply choosing to pay the regular wage. Such a payment should not eliminate the obligation to provide workers compensation benefits, including permanent partial disability benefits. Certainly the claimant was not earning the wage "at the work at which the employee is employed." K.S.A. 44-501(c).
3. The Board finds claimant has a 20 percent impairment to the right upper extremity.
4. The Board finds claimant is not entitled to temporary total disability benefits. In this case, the employer paid claimant for all but one week. An employee is not entitled to payment of temporary total disability for the first week unless he/she is off three consecutive weeks. K.S.A. 44-510c(b).

### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery on April 27, 1998, should be, and is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Ervin Granier, and against the respondent, Gold & Silver Jewelers, and its insurance carrier, Insurance Company of North America, for an accidental injury which occurred November 13, 1994, and based upon an average weekly wage sufficient for the maximum benefit of \$319 per week,<sup>1</sup> for 42 weeks at the rate of \$319 per week or \$13,398, for a 20% permanent partial disability to the right upper extremity, all of which is presently due and owing, less any amounts previously paid.

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<sup>1</sup> The parties stipulated the wage was sufficient for the maximum benefit of \$326 per week, but the maximum at the time was \$319 per week.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Seth G. Valerius, Topeka, KS  
Michael W. Downing, Kansas City, MO  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director